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No. 95-326

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

J & T COAL, INCORPORATED,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER CRIMINAL FINES ASSESSED AGAINST J&T COAL VIOLATED J&T'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHERE PRIOR "CIVIL" FINES HAD IMPOSED PUNISHMENT UPON J&T ARISING FROM THE SAME OFFENSE AND CONDUCT.

A. WHETHER THE CONCEPT OF "PUNISHMENT" AS STATED IN AUSTIN v. UNITED STATES, 125 L. Ed. 2d 488 (1993), IS APPLICABLE IN THE DOUBLE JEOPARDY CONTEXT? (The Fourth Circuit Ruled, "No.")

B. WHETHER A "CIVIL" FINE MORE THAN $130,000 IN EXCESS OF THE GOVERNMENT'S SWORN REMEDIAL COSTS OF $163,729 CONSTITUTES "PUNISHMENT?" (The Fourth Circuit Ruled, "No.")

C. WHETHER THE STATUTORY ELEMENTS, OR BLOCKBURGER v. UNITED STATES, 284 U.S. 299 (1932), TEST IS SATISFIED WHERE A DEFENDANT IS SUCCESSIVELY PROSECUTED FOR VIOLATING TWO SECTIONS OF THE SAME STATUTE, ONE OF WHICH PROHIBITS VIOLATION OF REGULATIONS AND THE SECOND OF WHICH PROHIBITS "WILLFUL"

VIOLATION OF THE SAME REGULATIONS? (The Fourth Circuit Found These Were Separate Offenses.)

II. WHETHER J&T IS ENTITLED TO A RESENTENCING BASED UPON THE COURT'S FAILURE TO RESOLVE CONTROVERTED FACTS REGARDING ITS ABILITY TO PAY A FINE OR TO DETERMINE ITS RELATIONSHIP TO A SECOND CORPORATION?

A. WHETHER THE DECISIONS BELOW CLEARLY VIOLATE FED. R. CRIM. P. 32, 18 U.S.C. §§ 3572 AND 3553, AND THE SENTENCING GUIDELINES IN IMPOSING A FINE WITHOUT CLEARLY RESOLVING MATERIAL DISPUTED FACTS? (The Fourth Circuit Found it too "Cumbersome" to Require a Finding on the Corporate Relationship Issue, and Excused the Absence of Factual Findings.)

B. WHETHER IT IS AN AFFRONT TO DUE PROCESS AND THE PRECEDENT OF THIS COURT FOR J&T'S FINE TO BE BASED ON THE ASSETS OF JAD, AN UNINDICTED, UNCHARGED CORPORATION WHICH HAS NOT BEEN ADJUDICATED J&T'S ALTER EGO? (The Fourth Circuit Held the Trial Court's Reliance on JAD's Resources in Fixing J&T's Fine was Wholly Appropriate.)

III. WHETHER THE COURTS ERRED IN REFUSING TO GROUP J&T'S OFFENSES WHICH INVOLVED THE SAME INCIDENT AND VICTIMS, AND, GIVEN THE DECISION NOT TO GROUP, FURTHER ERRED IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL IN CONTRAVENTION OF SENTENCING GUIDELINE § 3D1.4? (The Fourth Circuit Upheld the Sentencing Court's Grouping Determination in all Respects.)

LIST OF ALL PARTIES

The parties to this case are the United States of America and J&T Coal, Inc. ("J&T"), a Virginia Corporation. J&T filed Chapter 7 Bankruptcy on May 7, 1993, and has no parent companies of subsidiaries. The prosecution alleged below that J&T was the alter ego of a second corporation, JAD Coal Co., Inc. ("JAD"). No such finding was made below, however, and JAD has never been before the courts in this action.

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REPORTS OF OPINIONS BELOW

The decision of the United States District Court for the Western District of Virginia denying J&T's motion to dismiss on Double Jeopardy grounds is published at 818 F. Supp. 925 (W.D. Va. 1993) and appears in the Appendix at pp. 15-22. The trial court's sentencing of J&T was done orally and by unpublished Order, which appears in the Appendix at pp. 29-39. The trial court's unpublished grouping decision appears in the Appendix at pp. 23-28. The unpublished decision of the United States Court of Appeals for the Fourth Circuit is contained in the Appendix at pp. 1-14.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit issued May 30, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The relevant Constitutional provisions, statutes, Rules, and regulations are voluminous. Accordingly, pursuant to Rule 14.1(k) of the Rules of the Supreme Court, these provisions are set out in the Appendix to this Petition. The following is a listing of the provisions memorialized:

Amendment 5, U.S. Constitution at Appendix p. 53.

Rule 32(c)(3)(D), Federal Rules of Crim. Proc. at Appendix p. 54.

30 U.S.C. §§ 820(a) and (d) (1990) at Appendix p. 55.

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STATEMENT OF THE CASE

1. On February 13, 1991, a roof fall occurred in J&T's Mine #1 which resulted in the death of four miners. The Mine Safety and Health Administration (MSHA) assessed approximately $300,000 in "civil" penalties against J&T under 30 U.S.C. § 820(a) for violations of various regulations codified in the Code of Federal Regulations (CFR), Title 30. (App. 55-57.) On July 20, 1992, a "civil" complaint was filed in Federal District Court to obtain judgment against J&T for the fines assessed by MSHA.

2. The government provided evidence that it incurred costs in excess of $163,000 arising from the incident. (App. 50-51.) Over J&T's objection, the "civil" fines of approximately $300,000 were imposed. When J&T made clear to the

prosecution that it could not pay fines well in excess of $300,000 (including interest) in a lump sum, the government responded by filing an Application for Writ of Continuing Garnishment in April, 1993, and by seizing all of J&T's holdings. (JA 225-26, 273.)[1] The seized holdings had a value of approximately $90,000. (JA 233.) J&T had continued in operation until the government's levy. (JA 269.) It then filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (JA 225.)

3. On December 16, 1992, a criminal indictment was returned against J&T arising out of the same roof fall of February 13, 1991, and alleging willful violations of the very same safety standards that formed the basis of the prior, "civil" assessments. (App. 16, 40-48.) J&T filed a motion to dismiss the indictment (JA 28) which alleged violations of 30 U.S.C. § 820(d) and 30 C.F.R. §§ 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and 75.1200-2(b), (App. 56-57). It argued that the government had previously assessed penalties against J&T (under 30 U.S.C. § 820(a)) for violation of the same regulations and that pursuit of the criminal penalties violated the Double Jeopardy Clause. The trial court rejected J&T's Motion and filed a written opinion on the Double Jeopardy issue. (App. 15-22.)[2]

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[1]Reference to the Joint Appendix in the Court of Appeals for the Fourth Circuit will be by "JA ___." Reference to the Appendix to this Petition will be by "App. ___."

[2]The United States District Court for the Western District of Virginia had jurisdiction of this criminal action by virtue of 18 U.S.C. Section 3231, as it involved violations of 30 U.S.C. § 820 and related mining regulations. The basis for appellate jurisdiction in the Fourth Circuit was founded upon 18 U.S.C. Section 3742 and 28 U.S.C.

(continued...)

4. The ensuing criminal trial resulted in conviction of J&T, and the Court imposed a criminal fine of $1.4 million. (App. 33.)[3] The court credited the previously assessed $321,287 debt from the "civil" fines against this figure, so that the total assessment for the "civil" and criminal proceedings was $1.4 million. (App. 33.)

5. In the course of J&T's sentencing hearing, the trial court admitted extensive evidence relating to the finances of a second corporation, JAD Coal Co., Inc. ("JAD"), in which J&T's two principal owners, Aubra Dean ("Dean") and Carl McAfee ("McAfee"), possessed holdings. (JA 397.) The Court assessed fines without regard to J&T's inability to pay them. The Court considered the assets of JAD in fixing J&T's fine, while stating that it was not piercing the corporate veil. (App. 29, 33.)

6. J&T raised numerous objections to the presentence report. (JA 405-407.) The trial court failed to make findings pursuant to Fed. R. Crim. P. 32 with respect to these objections. These objections involved various matters including the presentence report's allegations of intertwined

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[2](...continued)
Section 1291, in that J&T appealed its fine alleging that it was imposed in violation of law and as a result of an incorrect application of the Sentencing Guidelines.

[3]The court reached this figure by multiplying $500,000, the "corporate" fine amount for a level 19 offense under § 8C2.4 of the 1992 Sentencing Guidelines, by the maximum available multiplier of 2.8 under the court's calculations pursuant to § 8C2.6. Because the offenses here at issue failed to fall into any clear guideline category, the court analogized them to Involuntary Manslaughter, a level fourteen base level under § 2A1.4. (JA 116-17.) Five levels were added to J&T's base level under § 3D1.4 of the Guidelines. (JA 121.)

corporate identity between JAD and J&T, and J&T's alleged ability to pay fines.

7. The Fourth Circuit Court of Appeals rejected J&T's appeal on all fronts. With respect to the Double Jeopardy issue it held:

(a) Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993) is an Eighth Amendment Excessive Fines Clause case which has no application to the Double Jeopardy context (App. 6),

(b) the language in United States v. Halper, that in "the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the government whole" 490 U.S. at 449, applies to non-fixed penalty cases and justifies a "civil" fine of over $300,000 even when the government's remedial costs of $163,000 are known, (App. 7) and

(c) that Blockburger v. United States, 284 U.S. 299 (1932), the standard for determining whether two prosecutions are "one" for purposes of Double Jeopardy, presents no hindrance to successive prosecutions under two statutes which are virtually identical except that the second statute contains a willfulness requirement absent in the first statute. (App. 5-6.)

8. The appellate court ignored the absence of trial court findings of fact under Rule 32 and 18 U.S.C. §§ 3572 and 3553 on the controverted issues of J&T's ability to pay a fine and its relationship with a second corporate entity, JAD. The Fourth Circuit held that it was entirely appropriate for the trial court to consider the funds of JAD, an unindicted, uncharged entity not before the Court, in fixing

J&T's criminal fine. (App 13.) It made this ruling despite the fact that there has never been a finding that JAD and J&T are alter egos or that either entity possessed adequate funds to pay a $1.4 million criminal fine.

9. The Fourth Circuit upheld the district court's conclusion that it was too "cumbersome" to require the court to resolve the corporate veil issue at sentencing (App. 13) and left this disputed factual issue unanswered. The court also upheld, in all respects, the trial court's grouping determinations.

REASONS FOR GRANTING THE WRIT

1. This Petition involves a Double Jeopardy claim on which the Circuits are plainly split, infra at 13-14, and a decision below which misconstrues, ignores and disavows precedents of this Court. This Petition should be granted to establish and reaffirm that:

- the concept of "punishment" as stated in Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993), is applicable in the Double Jeopardy context (infra at 10-14);

- under United States v. Halper, 490 U.S. 435, 448 (1989), and Austin, supra, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment...", such that a "civil" fine including a punitive sting of more than $130,000 in excess of the government's established remedial costs constitutes "punishment" (infra at 10-16); and

- the statutory elements, or Blockburger,[4] test will not permit a defendant to be successively prosecuted for violating two sections of a statute, one of which prohibits violation of mining regulations and the other which bars "willful" violation of the same regulations arising out of the same incident. (Infra at 16-20.)

This case provides an effective vehicle for addressing and resolving each of these important Double Jeopardy issues.

2. The Fourth Circuit below flatly found Austin inapplicable; extended Blockburger beyond its rational breaking point; and dismissed Halper as an aberration. The decision below creates flawed and dangerous precedent. After the largest "civil" MSHA fines in the history of the Western District of Virginia were imposed (JA 299) (including a punitive fine well in excess of the government's stated remedial costs), the Fourth Circuit stood by as a second "criminal" proceeding prosecuted J&T for "willful" violation of the very same MSHA regulations previously adjudicated in the civil trial. This second proceeding netted a $1.4 million fine for the same offense already prosecuted. This case cries out for review.

3. This Petition also presents the question of whether lower courts must make specific factual findings under Fed. R. Crim. Proc. 32, 18 U.S.C. § 3572, and related statutes, or whether such mandatory directives can be relaxed where imposition of criminal fines is involved. While cases vary greatly on the adequacy of sentencing findings, depending on the facts of each case, there is a broad split among the circuits on what constitutes acceptable "findings" with respect

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[4]Blockburger v. United States, 284 U.S. 299 (1932).

to determinations of a defendant's ability to pay a fine. Infra at 23-24 and n.8.

4. Here, Rule 32(c)(3)(D) was plainly violated in a material manner. J&T objected to presentence report statements regarding its ability to pay a fine and its alleged intertwined relationship with JAD. The absence of court findings on these controverted issues very much prejudiced J&T. If the court had appropriately addressed J&T's objections, it could not have imposed a $1.4 million fine. The absence of these mandatory findings requires a remand. Infra at 20-25. Similarly, the court's handling of the grouping issue resulted in a vastly increased, and unjust, fine. Infra at 28-29.

5. The fact-finding issue also calls into question the propriety of assessing a corporate fine against one entity, J&T, that is based on the assets of a second -- uncharged -- entity. Infra at 25-28. It defies fundamental concepts of fairness and due process for the trial court to assess J&T's fine based on JAD's assets where the court specifically has declined to pierce the corporate veil. (App. 29, 33.) Nothing in the sentencing guidelines permits such a manipulation of distinct corporate holdings. The Fourth Circuit's conclusion that it is too "cumbersome" to require the trial court to address at sentencing the factual dispute as to interconnection between J&T and JAD runs headlong into the precedent of this Court. Zenith Radio Corp. v. Hazletine, 395 U.S. 100 (1969). Infra at 26. Even the prosecution argued at sentencing that the veil must be pierced before an uncharged, unindicted entity's financial records became relevant to J&T's fines. (JA 305, 308-14, 322.)

6. The Fourth Circuit's imposition of huge fines without regard to corporate formalities or responsibility

presents a dangerous precedent -- a precedent which this Court should not let stand.

I. WHETHER CRIMINAL FINES ASSESSED AGAINST J&T COAL VIOLATED J&T'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHERE PRIOR "CIVIL" FINES HAD IMPOSED PUNISHMENT UPON J&T FOR THE SAME OFFENSE AND CONDUCT?

The Fifth Amendment provides that "No person shall...be subject for the same offense to be twice put in jeopardy of life or limb..." U.S. Const., Amend. 5. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Department of Revenue of Montana v. Kurth Ranch, ___ U.S. ___, 128 L. Ed. 2d 767 (1994). Although its text mentions only harms to "life or limb", it is well settled that the protection offered by the Double Jeopardy Clause also applies to imprisonment and monetary penalties. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Halper, 490 U.S. 435 (1989).

Here, the serious fines imposed upon J&T involved separate and successive proceedings which punished J&T for the same offense twice. The civil fines were already in place when the later, criminal fines were imposed. Thus, the guarantee against Double Jeopardy proscribes this second wave of fines where (1) the "civil" fines inflicted "punishment" upon J&T within the meaning of controlling precedents, and where (2) violation of the same mining regulations comprised the basis of the initial and subsequent punitive fines.

A. The Lower Courts Failed to Recognize that a "Civil" Sanction that is not Solely Remedial, but also Serves Deterrent or Punitive Functions is "Punishment" for Purposes of Double Jeopardy Analysis. This Ruling Widens a Split in the Circuits and Runs Directly Contrary to the Precedent of this Court.

In its recent decisions in Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993); Halper, 490 U.S. 435 (1989); International Union, United Mine Workers v. Bagwell, ___ U.S. ___, 129 L. Ed. 642 (1994); Kurth Ranch, ___, U.S. ___, 128 L. Ed. 2d 767 (1994), this Court has gone far in explaining that fines with a "civil" moniker nevertheless frequently impose punitive sanctions. When the "civil" sanction is, in fact, punitive in nature, a subsequent criminal or punitive prosecution for the same offense is barred. Kurth Ranch, supra; Halper, supra.

Notably, here, the district court repeatedly relied upon the test enunciated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) to determine the "civil" versus punitive aspects of the initial "civil" fine. (App. 17-19.) This Court, however, admonished in Austin, that:

> [T]he United States' reliance on Kennedy v. Mendoza-Martinez and United States v. Ward is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. See Mendoza-Martinez, 372 US at 167, 184, 9 L Ed 2d 644, 83 S Ct 554; Ward, 448 US at 248, 65 L Ed 2d 742, 100 S Ct 2636. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-

> Martinez and Ward. See. e.g., United States v. Halper, 490 US 435, 447, 104 L Ed 2d 487, 109 S Ct 1892 (1989).

125 L. Ed. 2d at 498, n.6. (Emphasis added.)

As recent decisions of this Court make clear, the correct test for determining whether a sanction is punitive is not whether it is deemed "civil" or "criminal". This is true, as the Court observed in Halper, because:

> It is commonly understood that civil proceedings may advance punitive as well as remedial goals...The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

Halper, 490 U.S. at 447-48. The Halper Court went on to state:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

490 U.S. at 448. While some explained Halper as a limited holding based on peculiar facts, its critical language was reiterated in Austin. This Court made clear in Austin that it meant what it had said in Halper when admonishing that any civil sanction which does not solely serve a remedial purpose is "punishment." 125 L. Ed. 2d at 498.

Other Circuits have embraced this reading of Halper, Austin, and Kurth Ranch in a Double Jeopardy context. See United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in Austin v. United States"); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (1994), reh'g denied, 56 F.3d 41 (9th Cir. 1995) (civil forfeiture action deemed Double Jeopardy violation following criminal conviction for the same offense). The Fourth Circuit flatly rejected any suggestion that Austin has application outside the Eighth Amendment realm:

> J&T seeks solace from certain language in Austin v. United States, ___ U.S. ___, 113 S. Ct. 2801 (1992), but Austin is an Eighth Amendment Excessive Fines clause case involving a forfeiture of a home and business under 21 U.S.C. §§ 881(a)(4) and (a)(7) by way of summary judgment after the owner had entered a plea of guilty to possession of cocaine with intent to distribute. We find it inapplicable to the present facts.

(App. 6.) This same sentiment was recently expressed in an acrimonious Ninth Circuit dissent in $405,089.23 U.S. Currency, 56 F.3d at 42-43 (dissenting denial of rehearing).

Here, the Fourth Circuit brazenly dismissed the Halper, Austin, and Kurth Ranch holdings that civil sanctions which do not solely serve remedial purposes are punishments. There is no denying that the so-called "civil" fine imposed against J&T included a punitive component many thousands

of dollars in excess of the sum necessary to make the government whole.

The heaviest "civil" fines ever imposed for MSHA violations in the Western District of Virginia were assessed against J&T as a result of the roof fall incident of February 13, 1991. (JA 299.) The government indicated by affidavit that it expended $163,729 in investigating the accident and in prosecuting J&T. (App. 50-51.) Yet the "civil" fines imposed below for this incident included a punitive sting which exceeded the government's expenditures by well in excess of one hundred thousand dollars.

Indeed, when viewed in the context of this case, the punitive aspects of this particular proceeding become readily apparent. When J&T offered to attempt to pay its debt of over $300,000 in installments, the prosecution's response was to issue an Application for Writ of Continuing Garnishment against J&T and to seize all J&T accounts. (JA 225-26, 273.)

The prosecution, nevertheless, proceeded with criminal charges arising from the same roof fall for an additional fine up to $1.4 million. When the maximum fine of $1.4 million was imposed, the court credited the previous outstanding $321,287 judgment from the "civil" fine against the new "criminal" fine so that the sanction did not exceed $1.4 million. (App. 33, 37.)

The Fourth Circuit's holding that a "civil" fine under this setting is not "punishment," runs contrary to clearly established precedent of this Court. While the prosecution may attempt to glean support from decisions such as U.S. v. WRW Corp., 986 F.2d 138 (6th Cir. 1993), U.S. v. Tilley, 18 F.3d 295 (5th Cir.), cert. denied, 130 L. Ed. 2d 490 (1994) and the blistering dissent in $405,089.23 U.S. Currency, 56

F.3d at 42-43, the prosecution's position -- and the Fourth Circuit's holding -- run directly contrary to the decisions of the Tenth Circuit in Hudson, 14 F.3d at 540, the Ninth Circuit in $405,089.23 U.S. Currency, 33 F.3d at 1219, and the Seventh Circuit in United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), cert. denied, 130 L. Ed. 2d 603 (1994), (finding no double jeopardy violation under the facts of that case). This important question, on which the Circuits are split, merits review by this Court.

B. The Fourth Circuit Misapplied the Precedent of this Court by Holding that a Fine Doubling the Government's Known Remedial Expenses Cannot be Punishment under Halper.

While intentionally sidestepping the central test stated in Halper, 490 U.S. at 448, the prosecution and lower courts wholeheartedly embraced the statement in that case that "fixed-penalty-plus-double damages provisions" are remedial, 109 S. Ct. at 1902. The courts cited United States v. WRW Corp., 986 F.2d 138 (6th Cir. 1993) as support. Again, such claims miss the mark. As WRW, which also involved fines for mining violations, quickly points out, "in this case there is no fixed penalty provision to review" as there was in Halper, 986 F.2d at 140. The same is true here. The inquiry in the case at bar is not whether a set "fixed penalty" reasonably correlates to remedial purposes, but whether the initial "civil" sanctions imposed against J&T and tailored to the facts of this case can safely be said to be solely remedial. Austin, 125 L. Ed. 2d at 498. As the Ninth Circuit observed, after Austin:

> [A] sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial

> purpose. See Austin v. United States, ___ U.S. ___, ___, ___ 113 S. Ct. 2801, 2806, 2812, 125 L. Ed. 2d 488 (1993).

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994).

Here, the government revealed that it spent approximately $163,000 as a result of the incident. The fine imposed was monumentally higher. The fine bankrupted J&T and the prosecution has garnished J&T's assets. The "civil" fine cannot be said to solely serve remedial purposes. Indeed, the trial court "credited" the sum of $321,216.80, the "civil" sanction due at sentencing (App. 33), against the criminal fine of $1.4 million, so that the total sanction for the two proceedings was $1.4 million.

Notably, the Sixth Circuit in WRW observed that the double jeopardy claim presented a "close call," 986 F.2d at 140, and that the defendants never suggested that the initial "civil" fine of $90,000 was excessive in relation to the government's expenses. 986 F.2d at 142. Indeed, because this was so, the government was not called upon to establish its related expenses in WRW. That cannot be said here; the prosecution established its expenses in this case and, nevertheless, sought well in excess of one hundred thousand dollars in "smart" money on top of that remedial amount.

The prosecution's resort to the Halper "fixed-penalty-times-two" paradigm here reveals the depth of the confusion in this area of law. In Halper, a case involving a small gauge multiple offender, the disputed language was discussing the circumstances in which "fixed-penalty-plus-double-damages provisions can be said to do no more than make the government whole." 490 U.S. at 449. The point is, where a

fixed fine is at work some approximation of remedial costs must be undertaken. Here there is no need to guess at the government's remedial costs. We know what they are -- because the government filed an affidavit swearing to them. (App. 50-51.) And we know the lower court imposed fines more than $130,000 in excess of those remedial costs. That additional sting makes clear that the "civil" fines which brought J&T to its knees were not solely remedial, but contained a strong dose of punishment. Subsequent criminal prosecution for the same offense, accordingly, runs afoul of the Fifth Amendment.

C. The Fourth Circuit's Interpretation of the Blockburger Test Would Render Double Jeopardy Meaningless and Runs Counter to the Precedent of this Court.

Nor should there be any question concerning whether the second prosecution -- involving the criminal fine -- arose from the same "offense" as the previous "civil" prosecution. Obviously, J&T's acts underlying the roof fall were the same under both the "civil" and "criminal" proceedings.

When the traditional statutory elements -- or Blockburger -- test is applied to the proceedings under review, it readily becomes clear that both punishments meted out here were for the same offense. Blockburger states that, in comparing two offenses, "if each statute requires proof of an additional fact which the other does not," the offenses are not considered the "same offense" for Double Jeopardy purposes. Blockburger v. United States, 284 U.S. 299,304 (1932). Put another way, Justice Scalia has written, "If it is possible to violate each one without violating the other, then they cannot constitute the 'same offense.'" Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia) maj. overruled by United States v. Dixon, ___ U.S. ___, 125 L. Ed. 556 (1993).

Since Blockburger, this Court has expanded the inquiry a court must make when engaging in a Double Jeopardy Clause analysis. In addition to examining the elements of the offenses to determine whether they are the same, as required under Blockburger, a court must also consider whether one offense is a lesser included offense of the other. For example, in Brown v. Ohio, 432 U.S. 161, 167-68 (1966), this Court applied this lesser included offense analysis to the crimes of joyriding and auto theft:

> Joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession... The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well.

The Brown Court held that because the lesser offense, joyriding, required no proof beyond that required for the greater offense of auto theft, the two were the "same offense" for purposes of the Double Jeopardy Clause. Furthermore, under this Court's decision in Harris v. Oklahoma, 433 U.S. 682 (1977), a court must determine whether one offense is a "species of a lesser-included offense" of the other, thereby expanding the analysis required under Brown. The Court found that commission of a stated felony, in Harris robbery, was a lesser included offense of the felony murder rule and was thus barred.

In this case, J&T Coal received "civil" fines of approximately $300,000 for failing to adhere to various MSHA standards codified under CFR Title 30, which constituted a violation of 30 U.S.C. § 820(a). The second,

"criminal" prosecution of J&T merely alleged willful or knowing violation of the same MSHA standards, which constitutes a violation of 30 U.S.C. § 820(d), allowing for criminal fines which in this case totaled $1,400,000.

The criminal prosecution resulted in the conviction of J&T for Counts I, III, V, VII, IX, and XI of the indictment. (App. 35.) These counts alleged "willful" violations of 30 C.F.R. §§ 75.202(a), 75.202(b), 75.203(a), 75.203(b), 75.220(a)(1), and 75.1200-2(b). (App. 40-48.) Each of these violations had previously been alleged and prosecuted as the basis for the "civil" fines imposed in the amount of approximately $300,000.[5] The criminal prosecution under 30 U.S.C. § 820(d) merely asserted that several of the same regulations previously prosecuted under § 820(a) were violated "willfully."

The Fourth Circuit determined that since § 820(d) contained a willfulness component not present in § 820(a), the Blockburger requirement was satisfied:

> The government contends that under United States v. Dixon, ___ U.S. ___, S. Ct. 2849 (1993), which readopted the "same elements" test of Blockburger v. United States,

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[5]The trial court's double jeopardy decision, in fact, acknowledges that the "civil" and "criminal" proceedings involved the same acts, stating: "On December 16, 1992, J&T Coal was indicted under 30 U.S.C. § 820(d) for willful violations of the same safety standards that formed the basis for the ["civil"] assessments." (Emphasis added.) (App. 16.) The prosecution concedes, as it must, that in this case "the conduct which gave rise to the civil assessment and the conduct which gave rise to the criminal prosecution were the same." Appellee's br. in Fourth Circuit at 13.

> 284 U.S. 299 (1932), it was required to prove the additional element of a willful violation of the mandatory health or safety rules to secure a conviction under § 820(d) and, therefore, the criminal prosecution is not subject to the double jeopardy bar. This contention is correct. The elements of the offenses described in the two sections are not the same. Section 820(a), which established civil penalties, requires only proof of a violation of the health or safety standards by a preponderance of the evidence, but § 820(d), the criminal penalty section, requires proof beyond a reasonable doubt of a willful violation or refusal to comply with the same standards.

(App. 5-6.)

The Fourth Circuit's reasoning that the offenses here at issue survive the Blockburger test, if upheld, would stand Double Jeopardy jurisprudence on its head. Manifestly, the fact that one statute contains one willfulness element not present in a second statute is insufficient to differentiate the two "offenses" under Blockburger. If the prosecution's theory were the applicable analysis, the protection of the Double Jeopardy Clause would be non-existent. Blockburger states that, in comparing two offenses, each statute must require proof of an additional fact which the other does not or the offenses should be considered the "same offense" for Double Jeopardy purposes. Blockburger v. United States, 284 U.S. 299, 304 (1932).

Certainly, the Fourth Circuit's rule that the presence of a single willfulness component in § 820(d) is sufficient to

overcome J&T's Double Jeopardy claim, if adopted, would do great violence to Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977), and the concept that, for purposes of Double Jeopardy, a "lesser included offense" is considered the "same offense" as the greater offense charged. Here, the first prosecution involved violations of MSHA regulations while the second prosecution involved alleged willful violation of the same regulations. Hence, the underlying "civil" violation (the lesser included offense) had already been adjudicated when the second wave of prosecution began.

* * *

This Petition raises Constitutional issues of the utmost importance; questions upon which the Circuits are split, and on which the dictates of this Court are being misconstrued and disavowed. The Fourth Circuit's logic is flawed and dangerous; yet it serves well to illustrate the existing confusion in the Double Jeopardy arena, and the need for this Court to provide further guidance.

II. THE FOURTH CIRCUIT IGNORED THE ABSENCE OF REQUIRED FINDINGS OF FACT, AND IMPERMISSIBLY PERMITTED THE SENTENCING COURT, IN ASSESSING J&T'S FINE, TO RELY ON THE FUNDS OF A SECOND CORPORATION, JAD, -- WHICH WAS NOT BEFORE THE COURT AND HAD NOT BEEN DETERMINED TO BE AN ALTER EGO OF J&T.

Fed. R. Crim. P. 32(c)(3)(D) requires that the sentencing court, as to each matter controverted in a presentence report, either make a finding as to the accuracy of the challenged factual proposition or determine that no reliance will be placed on that proposition at the time of sentencing. (App. 54.) The rule leaves no discretion in this

regard. Rarely has the justification for a federal rule been so well illustrated as by this case.

A. The Questions of Whether J&T had the Ability to pay a $1.4 Million Fine and Whether J&T and JAD Should be Considered an Intertwined Entity were Controverted and no Rule 32 Findings were Made.

In assessing J&T's ability to pay a fine in excess of one million dollars, the trial court was required to consider various factors. Under §§ 8C2.8(a)(10) and 8C2.10 of the Sentencing Guidelines and 18 U.S.C. §§ 3572 and 3553, the court was required to consider various factors relating to J&T's ability to pay a fine. Here, the district court not only failed to determine whether J&T had the ability to pay the fine imposed, but also failed to state these findings on the record. In reality, the record left little room for dispute that J&T was in no condition to pay a $1.4 million fine. Supra at 3.

The district court, in imposing sentence, did briefly turn to the factors enumerated in section 3572; but, rather than making findings as to the factors, the Court simply stated, "Many of these [factors] ring hollow in light of the fact that this company is in bankruptcy." (App. 33.) The fact that J&T was in bankruptcy should not have relieved the Court of having to make the specific findings required under Section 3572.[6] Indeed, J&T's bankruptcy directly affected many of the factors listed in Section 3572, and weighed in favor of a low fine.

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[6]Bankruptcy does not mean that the Debtor was without assets or unable to meet all of its obligations.

Instead, the court considered evidence of the assets of a second corporation, JAD, which was a separate corporate entity, in fixing J&T's fine. Even the prosecution recognized that J&T's inability to pay a fine on its own was an obstacle to the sanction imposed. The prosecution acknowledged:

> If this Court were to merely look at the surface and accept J&T's suggestion that they're in bankruptcy, that's where this Court is going to look, that's it, might as well just stop here and not go any further.

(JA 305.) It was the government's theory, therefore, that J&T's relationship with a second company, JAD, was such that J&T and JAD should be considered one entity and JAD's assets applied to J&T's fines. (JA 307-08, 322.) Accordingly, the prosecution put on extensive evidence in this regard. J&T objected to such claims on the record and in its objections to the presentence report. (JA 406-07.)[7]

Despite the prosecution's repeated claims that the court must pierce J&T's "corporate veil" to get to JAD's money (JA 306-08, 322), the court specifically declined to pierce the veil. (App. 29, 33.) Yet, it imposed the maximum fine available under the guidelines by accepting evidence of

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[7]In fact, the evidence revealed that J&T and JAD had two separate charters (JA 222-23), two separate purposes -- J&T mined, JAD did not -- (JA 220, 222), and were formed in different decades. (JA 222-223.) J&T and JAD had separate minute books, stock books, annual reports, tax returns and bank accounts. (JA 319.) Notably, JAD and J&T had somewhat different ownership. Alleged liability of JAD affected shareholders, such as Julia McAfee, who were not owners of J&T, but who had an interest in JAD. (JA 236, 277-78.)

JAD's financial status even though JAD was not the defendant.

The court failed to make a specific finding that J&T had the ability to pay. (Even the Presentence Report stated that J&T did not have the ability to pay on its own. (JA 397.)) The court also failed to find that J&T and JAD were alter egos. (App. 33.) Presumably, it used JAD's funds to attempt to justify J&T's fine. Yet, there was no evidence JAD had funds sufficient to cover the massive fine.

The presentence report suggested only that JAD had sufficient resources to pay the fine recommended in that report, which had a range of $119,000 to $238,000. (JA 398 -- under seal.) The trial court, however, rejected that fine recommendation, imposed a fine of $1.4 million, and never made any determination as to the defendant's ability to pay. Because it ignored the requirements of Rule 32 and relevant statutes, the Court imposed a fine that J&T could not possibly pay.

Notably, under an analogous guideline for fines of individuals, Sentencing Guideline § 5E1.2, there is a split raging among the Circuits with respect to the necessity of specific findings relating to imposition of fines.[8]

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[8]This controversy was summarized by the Eleventh Circuit in United States v. Lombardo, 35 F.3d 526, 529 (11th Cir. 1994):

> The circuits are divided on this issue. Compare United States v. Tosca, 18 F.3d 1352, 1354-55 (6th Cir. 1994) (holding that specific findings are not required where "it may be fairly inferred [from the record] that the district court considered ... the factors required by law"); United States v. Savoie, 985

(continued...)

This case offers the Court an opportunity to provide guidance

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[8](...continued)
F.2d 612, 620 (1st Cir. 1993) (holding that the failure to make specific findings in open court concerning the defendant's financial condition and prospects did not necessitate reversal); United States v. Fair, 979 F.2d 1037, 1040-41 (5th Cir. 1992) (holding that specific findings are only required where the district court adopts the presentencing report but then departs from the report's recommendation on fines); United States v. Washington-Williams, 945 F.2d 325, 327-28 (10th Cir. 1991) (holding that express findings are not required); United States v. Marquez, 941 F.2d 60, 65 (2d Cir. 1991) (holding that an explanation of the court's consideration of the factors would be helpful but is not required); and United States v. Mastropierro, 931 F.2d 905, 906 (D.C. Cir. 1991) ("The guidelines set forth no requirement, however, that the sentencing court make express findings on this question and we decline to create one.") with United States v. Demes, 941 F.2d 220, 223 (3d Cir.) (vacating fine because the district court made no finding as to the defendant's ability to pay and therefore the appellate court could not conclude that the district court had considered the issue), cert. denied, 502 U.S. 949, 112 S. Ct. 399, 116 L. Ed. 2d 348 (1991); United States v. Masters, 924 F.2d 1362, 1369 (7th Cir.) (vacating fine because, among other reasons, "the judge made no findings with respect to any of the factors and he must do so on remand before imposing a fine), cert. denied, 500 U.S. 919, 111 S. Ct. 2019, 114 L. Ed. 2d 105 (1991); and United States v. Cammisano, 917 F.2d 1057, 1064 (8th Cir. 1990) (holding that district courts "must make specific findings on the record that demonstrate that the factors [set forth in Guidelines § 5E1.2] were considered before a fine may be imposed" (internal quotation omitted, alteration in original)); cf. United States v. Quan-Guerra, 929 F.2d 1425, 1426 (9th Cir. 1991) ("When the record demonstrates unequivocally that the defendant is indigent, the district court is required to determine whether the defendant has the ability to pay any fine which might be imposed.")

on this split of authority and to make clear that a fine cannot be imposed where there is no evidence of record that the defendant could possibly pay it.

B. The Fourth Circuit's Ruling that it is Proper to Consider a Second, Unindicted Corporation's Assets in Imposing J&T's Fine is an Affront to Due Process and the Precedent of this Court.

Both the district court and Fourth Circuit held that it was too "cumbersome" to require resolution of the presentence report's corporate veil allegations at sentencing. (App. 13, 29.) Hence, no finding was made as to J&T's objection to the corporate veil allegations in the presentence report. Yet JAD's resources were considered in fixing J&T's fine.

The Fourth Circuit purported to justify such lax procedural safeguards in this case (involving fines in excess of one million dollars) by reasoning that appropriate proceedings could be held later in the district or bankruptcy court in efforts to resolve the parties' rights:

> If further proceedings are needed to bring in JAD and/or the two [sic] owners of J&T and JAD, this can be done by appropriate proceedings in the bankruptcy court or the district court. It could not be done at the sentencing proceeding because neither JAD nor the two [sic] individual owners of J&T and JAD were before the court.

(App. 13.) The courts below, in effect, constructed a system by which federal judges may "impose fines now, and ask questions later."

The Fourth Circuit's assurance that J&T and JAD's steamrolled procedural safeguards could be addressed at a later date are unfounded. An opportunity to litigate one's criminal liability for the first time at the punishment stage is not meaningful either in time or manner. Cf. United States v. Crozier, 777 F.2d 1376, 183-84 (9th Cir. 1985) (stating, in the context of criminal forfeiture, that "a hearing for parties with a third party interest which takes place months or years after a restraining order is issued, cannot be construed as a hearing provided 'at a meaningful time.'").

The Fourth Circuit's suggestion that JAD could receive an opportunity to be heard on the alter ego issue after staggering criminal liability had already been established would not offer due process at a meaningful time. This is supported by well established law that jurisdiction over a corporation does not afford jurisdiction over an alter ego until after a court has pierced the corporate veil. See Zenith Radio Corp. v. Hazletine, 395 U.S. 100, 111 (1969) (holding that judgment against subsidiary corporation is not enforceable against parent corporation because parent had never had its day in court on whether it and its subsidiary should be considered as one and the same).[9]

The corollary should be true here. J&T's fines should not be based on JAD's assets unless and until it is determined the two entities should be considered one.

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[9]Further, even if JAD were determined to be the alter ego of J&T at a subsequent proceeding, this would not cure the absence of due process as to JAD where the "punishment" of a $1.4 million fine already had been meted out in JAD's absence. Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 86-87 (1988); Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

J&T filed clear objections to the presentence report relating to its inability to pay its fine and denying its alleged interrelationship with JAD. (JA 406-07.) The trial court's failure to rule on these controverted issues runs afoul of the non-discretionary dictates of Fed. R. Crim. P. 32(c)(3)(D) and 18 U.S.C. § 3572. Had the trial court obeyed these modest requirements, it could not have reached the conclusion that J&T could pay the $1.4 million fine.

The Fourth Circuit's approval of the trial court's "non-findings" was nothing less than an abdication of judicial responsibility. Further, the court's suggestion that it was too "cumbersome" to mandate that J&T and JAD's relationship be factually resolved at sentencing is unfair to J&T, as well as to future litigants.

While Constitutional protections, indeed, may be cumbersome at times, they are the defining principles of the Rule of Law. It is impermissible to impose fines on J&T by backhand reference to a second entity to which J&T may or may not be related. Certainly, the sentencing guidelines themselves offer no support for the court's actions.

The decision below sets a dangerous precedent, particularly when it is considered that the Fourth Circuit recognized that J&T and JAD's relationship was "not unusual" in the mining industry. (App. 4.) If the Fourth Circuit's logic is correct, any corporation may find that its fine can be based, not on its own assets, but on those of a second larger organization with which it may or may not be closely affiliated. This decision cries out for further review and reversal.

III. THE COURTS ERRED IN REFUSING TO GROUP J&T'S OFFENSES UNDER THE SENTENCING GUIDELINES, AND 'IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL GIVEN THE DECISION NOT TO GROUP.

J&T was convicted of misdemeanor mining violations not specifically addressed by an existing guideline. Because there was no expressly applicable guideline, the court, under 18 U.S.C. § 3553 and U.S.S.G. § 2X5.1, applied the most analogous guideline for the offense. The court turned to the guideline covering involuntary manslaughter, U.S.S.G. § 2A1.4(a)(2), a significant felony which carries a base level of fourteen under the guidelines.

In determining whether counts should be grouped, the grouping guideline directs the court to group counts "involving substantially the same harm" U.S.S.G. § 3D1.2. (App. 63.) J&T's convictions arose from a single incident involving the same victims. Grouping the offenses was appropriate. The court concluded, however, that the offense involved multiple victims and that subsections (a), (b) and (d) of Section 3D1.2 could not apply. (App. 23-29.) Following the analysis of Application Note 2 in the Commentary to Section 3D1.2 (App. 63, 65-66), the "victim" of a 30 U.S.C. Section 820 violation is society's interest in having coal mined only in accordance with the mandatory safety standards. That victim would have been harmed, and punishment would have followed, if no miners had been affected.

Even if the four miners are considered the primary victims of the roof fall, the court's decision not to group was erroneous here since each count involved precisely the same victims. (App. 40-48.) The trial court found that it could not group based upon an overly strict interpretation of the

comment at U.S.S.G. § 3D1.2 and a literal reading that where more than one victim is involved -- even if the same victims are involved in each count -- grouping is prohibited under subsections (a) and (b).

J&T's offense involved a single decisional process. The facts of this case do not warrant a technical refusal to group where the multiple counts arise from a single incident involving the same victims.

While J&T contends that the court erred in refusing to group in this case, the court was also wrong in the manner it calculated its refusal to group. The court added five levels to J&T's offense level based on the fact that J&T was guilty of six violations. The problem with this analysis is that the "analogous guideline" upon which the sentence was based was involuntary manslaughter. There were four deaths involved in the roof fall incident. There can be no more homicide convictions than there are deaths. Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989), cert. denied, 493 U.S. 1063 (1990). Thus, at most there could only be four "involuntary manslaughters" here. The court could not merely conclude that six mining misdemeanors necessarily correlated to six "units" of "manslaughter" for purposes of the calculations of § 3D1.4. (App. 75.) Properly considered, only three additional "involuntary manslaughter convictions" were possible in this case.

The court's imposition of a five level increase to "19" -- as opposed to a three level increase to "17" -- literally doubled the available fine under the guidelines. (App. 81.) The manner in which this fine was imposed only confirms that this is a case in which "rough justice" became clear injustice.

CONCLUSION

This Petition presents issues of vital importance on which the Circuits are split. As illustrated by this case, decisions of this Court including Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993), United States v. Halper, 490 U.S. 435 (1989), and Blockburger v. United States, 284 U.S. 299 (1932) are being misconstrued or disregarded.

The Fourth Circuit's decision below does violence to this Court's Double Jeopardy jurisprudence. Its holding that the mandatory language of Fed. R. Crim. P. 32, and related statutes, may be glossed over where its requirements are "cumbersome" also merits this Court's review. J&T's Petition should be granted to clarify the law and to correct a manifest injustice below.

Respectfully submitted,

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